CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 25

BENJAMIN F. BELCHER, PETITIONER,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED FEBRUARY 9, 1944.

CERTIORARI GRANTED MARCH 27, 1944.

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in Supreme Court of Illinois	a	1
Caption (omitted in printing)	a	
Abstract of record from Circuit Court of St. Clair County	1	1
Caption	1	1
Proceedings in City Court of East St. Louis, Illinois	1	1
Complaint	2	1
Amended answer	6	5
Exhibit "A"—Release and warrant in payment of amount of settlement	13	9
Reply to amended answer	16	12
Verdict	21	15
Ruling of Court on defendant's motion for new trial	21	15
Plaintiff's motion for change of venue	23	17
Minute orders of trial	25	18
Order denying motion to strike complaint	25	18
Orders denying defendant's motions for directed verdict	25	19
Verdict	26	19
Order granting motion for new trial, etc.	27	19
Order granting change of venue	28	20

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 16, 1944.

Abstract of record from Circuit Court of St. Clair County—Continued	Original	Print
Defendant's motion to quash process of summons and to dismiss cause	29	21
Order sustaining motion to dismiss, and entering judgment of dismissal	32	23
Certificate of trial judge	33	24
Notice of appeal to Supreme Court of Illinois	33	24
Caption	35	26
Opinion, Wilson, J.	36	27
Judgment	38	29
Petition for rehearing	40	31
Order denying petition for rehearing	51	39
Order staying mandate	52	40
Clerk's certificate	53	41
Order allowing certiorari	54	42

[fol. a] [Caption omitted]

[fol. 1]

IN THE SUPREME COURT OF ILLINOIS, MAY TERM, A. D. 1943

BENJAMIN F. BELCHER, Plaintiff-Appellant,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Defendant-Appellee

Appeal from the Circuit Court of St. Clair County, State of Illinois

Hon. Alfred D. Riess, Trial Judge

Abstract of Record—Filed April 20, 1943

Placita and convening order of the Circuit Court of St. Clair County, Illinois, September 14, 1942.

Transcript of Proceedings in the City Court of East St. Louis, Illinois

(Filed in the Circuit Court of St. Clair County, Illinois, August 10, 1942)

Title page of transcript, with endorsement of filing in the Circuit Court of St. Clair County.

Placita and convening order in the City Court of East St. Louis, Illinois, June 22, 1940.

Index of transcript.

[fol. 2] COMPLAINT

(Filed in the City Court of East St. Louis, Illinois, June 22, 1940)

Benjamin F. Belcher, plaintiff, by Mark D. Eagleton and McGlynn & McGlynn, his attorneys, complaining of the Louisville & Nashville Railroad Company, a corporation, defendant, alleges:

1. That defendant now is, and at all times herein mentioned was, a railroad corporation duly organized and exist-

ing according to law, engaged in the business of owning and operating railroad systems, lines, properties, tracks, trains, engines and cars, and operating the same as a common carrier by railroad transporting freight and passengers for hire in interstate commerce to and from the State of Illinois, and to and from various other of the several states of the United States, and having an office and place of business, and doing business, in the City of East St. Louis, State of Illinois.

2. That on the 15th day of February, 1939, and for a long time prior thereto, plaintiff was a servant in the employ of defendant as a switchman working upon and about defendant's trains, engines and cars, and particularly in the terminal yards on defendant's lines at Nashville, Tennessee.

3. That, as such servant and employee, plaintiff earned an average of approximately $200.00 per month.

4. That on said 15th day of February, 1939, plaintiff was working as such servant and employee of defendant in said terminal yards, in, on and about the trains, engines and [fol. 3] cars then and there moved, hauled and used by defendant in the furtherance of defendant's aforesaid business of interstate commerce and transportation as a common carrier by railroad.

5. That, by reason thereof, plaintiff and defendant then and there became and were subject to certain statutes of the United States of America, then and there in full force and effect, relating to the liability of interstate common carriers by railroad for injury to and death of their employees, which said statutes are commonly known and referred to as the Federal Employers' Liability Act (45 U. S. C. A., §§ 51-59) and the Federal Safety Appliance Act (45 U. S. C. A., § 1-16).

6. That, under the aforesaid statutes, it became and was the duty of the defendant not to haul, nor permit to be hauled or used on its line, any car not equipped with an efficient hand brake as prescribed by the Interstate Commerce Commission of the United States of America by order promulgated and entered March 13, 1911, pursuant to the provisions of said statutes, and particularly the aforesaid Safety Appliance Act (45 U. S. C. A., §§ 11, 12).

7. That defendant disregarded its duty in this behalf, and then and there hauled and had in use upon its lines certain tank car which plaintiff was required to handle, use and work upon in the course of his employment by defendant as aforesaid, and which was not equipped with an efficient hand brake as prescribed by the aforesaid Safety Appliance Act and the aforesaid order of said Interstate Commerce Commission.

8. That while plaintiff was then and there engaged in interstate commerce and in the course and scope of his [fol. 4] employment, as aforesaid, and was upon and using said tank car aforesaid, plaintiff attempted to use the hand brake upon said tank car, and said hand brake did operate inefficiently and did give way and turn, causing plaintiff to be thrown from said car, to fall to the ground, and to sustain serious and permanent injuries and damages hereinafter more particularly set out, all of which resulted in whole or in part from the inefficiency of said hand brake and defendant's aforesaid violation of its duty in said Safety Appliance Act and the said order of the Interstate Commerce Commission promulgated and made pursuant thereto, as hereinbefore alleged.

9. That, by reason of defendant's aforesaid failure to have said tank car equipped with an efficient hand brake in violation of the aforesaid Safety Appliance Act and the aforesaid order of said Interstate Commerce Commission, plaintiff was injured and damaged as aforesaid in the following respects, to wit, that plaintiff's back, spine, spinal column, vertebrae, lumbosacral articulation, sacroiliac joints, shoulder, hip, pelvis and sacrum, and the bones, joints, muscles, tendons, ligaments, cartilages, nerves, vessels, tissues and skin thereof, were bruised, contused, wrenched, sprained, strained, twisted, distorted, rotated, crushed, compressed, deformed, torn, inflamed and irritated; that plaintiff sustained a sclerosis of the right lumbosacral articulation; that a pre-existing, but dormant, condition of arthritis in plaintiff's back, spine, hip and sacroiliac region was aggravated, inflamed, and rendered painful; that plaintiff sustained severe shock, and his nerves and nervous system were severely shocked; that plain [fol. 5] tiff suffered, suffers, and will in the future continue to suffer, severe pain of body and anguish of mind, and

from nervousness, loss of weight, weakness and insomnia; that plaintiff's ability and capacity to stand, walk, work, earn a livelihood and enjoy himself has been seriously, greatly and permanently impaired and diminished; that plaintiff has been totally and permanently disabled from performing his usual work and duties as a switchman, and from performing any work necessitating labor or activity; that plaintiff has lost his wages and earnings of approximately $200.00 per month since the date of his injury aforesaid, and will in the future continue to lose all or the greater portion thereof; that all of the aforesaid injuries, damages and effects are serious and permanent, and the function and use of all the aforesaid parts and organs have been seriously and permanently impaired, diminished and rendered painful, and that the plaintiff has been permanently reduced from a strong, able-bodied man, capable of earning a substantial livelihood, to a permanent cripple, incapable of earning a living or enjoying life.

Wherefore, plaintiff prays judgment against defendant in the sum of sixty thousand dollars ($60,000.00) and his costs herein.

Mark D. Eagleton, 1004 Telephone Bldg., St. Louis, Missouri; McGlynn & McGlynn, 120 North Main Street, East St. Louis, Illinois, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 6] Plaintiff requests the issue of summons for defendant in this cause.

Mark D. Eagleton and McGlynn & McGlynn, Attorneys for Plaintiff.

Plaintiff demands a trial by jury in this cause.

Mark D. Eagleton and McGlynn & McGlynn, Attorneys for Plaintiff.

Summons, issued June 22, 1940, and (on reverse side) sheriff's return.

Defendant's motion to dismiss or strike on account of insufficient complaint, filed in the City Court of East St. Louis, Illinois, July 9, 1940.

Defendant's answer, filed in the City Court of East St. Louis, July 30, 1940.

Plaintiff's reply to answer of defendant, filed in the City Court of East St. Louis, Illinois, August 26, 1940.

DEFENDANT'S AMENDED ANSWER—Filed in the City Court of East St. Louis, Illinois, September 9, 1940

1. This defendant, Louisville & Nashville Railroad Company, for answer to paragraph 1 of the complaint, admits the allegations of said paragraph 1.

2. This defendant denies that on the 15th day of February, 1939, at the time of his alleged injury, the plaintiff [fol. 7] was a servant in the employ of the defendant as a switchman, working upon and about defendant's train, engines and cars in the terminal yards on defendant's lines at Nashville Tennessee.

3. Denies that, as such servant and employee of this defendant, plaintiff earned an average of approximately $200.00 per month.

4. Denies that on said 15th day of February, 1939, at the time of his alleged injury, plaintiff was working as such servant and employee of this defendant in said terminal yards in, on and about engines and cars then and there used, hauled and moved by the defendant in the furtherance of its aforesaid business of interstate commerce and transportation as a common carrier by railroad.

5. Denies that by reason thereof plaintiff and defendant then and there became and were subject to certain statutes of the United States of America, then and there in full force and effect, relating to the liability of interstate common carriers by railroad for injury to and death of their employees, as in said section 5 of the complaint alleged, but states the fact to be that this defendant was engaged in interstate commerce, and that the plaintiff was not in its employ on the occasion of his injuries as in said complaint alleged.

6. This defendant admits paragraph 6 of the complaint.

7. This defendant denies that it disregarded its duty in this behalf and denies that it then and there hauled, and had in use, upon its lines, a certain tank car which plaintiff

was required to handle, use and work upon in the course of his employment by defendant, and which was not equip- [fol. 8] ped with an efficient hand brake, and denies that it was not equipped with a sufficient hand brake as prescribed by the aforesaid Safety Appliance Act and the aforesaid order of the Interstate Commerce Commission, and denies that plaintiff was employed by defendant on such car.

8. This defendant, answering paragraph 8 of the complaint, says that while the plaintiff was then and there engaged in the course and scope of his employment, and was upon and using said tank car, this defendant denies that the plaintiff attempted to use the hand brake upon said tank car, and denies that said hand brake did operate inefficiently, or that it gave way and turned, causing plaintiff to be thrown from said car, to fall to the ground, and to sustain serious and permanent injuries and damages as set out in said complaint; and denies that the plaintiff received any injuries on account thereof, in whole or in part, from the alleged inefficiency of said hand brake, and defendant's alleged violation of its duty under said Safety Appliance Act and order of the Interstate Commerce Commission, as in said paragraph 8 of the complaint alleged.

9. Denies that by reason of defendant's alleged failure to have said tank car equipped with an efficient hand brake, in violation of said Safety Appliance Act, and any order of the Interstate Commerce Commission, that plaintiff was injured and damaged as in said complaint alleged; denies that the plaintiff was injured or damaged by reason of any inefficient brake, and denies that he was injured or suffered any damages whatsoever by reason thereof; denies that the plaintiff, by reason of anything alleged in his [fol. 9] complaint, suffered any injury as therein alleged, or any damage as therein alleged, and denies that he is entitled to recover damages for said sum of $50,000.00, or any other sum on account thereof.

10. This defendant, further answering, denies that it is guilty of any negligence or default whatever in any respect charged against it, and especially denies that said hand brake on said car complained of by the plaintiff was in any respect inefficient.

11. And this defendant, further answering, says that it is a railroad corporation engaged in interstate commerce, and was so engaged on the 15th day of February, 1939, but denies that the cut of cars, including the tank car which plaintiff alleges had an inefficient brake, was in the custody or control of this defendant, or was being moved by this defendant; denies that the plaintiff, at the time he alleges he was in the employ of this defendant in the handling of such tank car, was its employee, but states that said plaintiff was not the employee of this defendant at the time, and in the handling of such tank car or the cut of cars of which said tank car was one, or that this defendant had any control over the plaintiff, and that therefore this defendant was not guilty of any of the charges of negligence made against it in the complaint herein, and is not liable to the plaintiff in damages for any sum whatsoever.

12. And, in the alternative, this defendant, further answering said complaint, states that on, to wit, the 15th day of February, 1939, the said railroad switching yards known as the Kayne Yards at Nashville, Tennessee, the yards in [fol. 10] which the plaintiff was then employed as a brakeman or switchman, were under lease from the Louisville & Nashville Terminal Company, a corporation under the general laws of Tennessee, to the Louisville & Nashville Railroad Company, and the Nashville, Chattanooga & St. Louis Railway Company jointly, and including track No. 104 in said yard on which the cut of cars, including the car which plaintiff alleges had an inefficient brake, were being operated; that the said Louisville & Nashville Railroad Company and the said Nashville, Chattanooga & St. Louis Railway Company, by mutual agreement, arranged for the maintenance and operation, for their joint use, of said switching yards by an unincorporated company known as Nashville Terminals, which said Nashville Terminals had a Board of Control, consisting of three men, a superintendent, and the general managers of the two said railroads, which said Nashville Terminals was to, and did, maintain and operate said yards for the said two railroad companies, the cost of operation by said Nashville Terminals of said switching yard being paid by the said railroads in the proportion of the number of cars of each railroad handled in said yards; that said railroad switching yard was being so operated under said joint lease as hereinabove

stated, on, to wit, the 15th day of February, 1939, and before and since that date, and including said track 104 in said yards over which said cut of cars and said tank car complained of by the plaintiff were being moved by said Nashville, Chattanooga & St. Louis Railway Company; that as to the movement, handling and condition of said tank car, and the brake thereon, if the same was inefficient and caused the plaintiff's alleged injuries, the said Nashville, Chattanooga & St. Louis Railway Company and the [fol. 11] Louisville & Nashville Railroad Company concurred in causing the tort and were joint tort-feasors; that on the 3rd day of April, 1939, the said plaintiff, for a valuable consideration, under agreement made and delivered by him in writing, released, settled with, acquitted and discharged the said Nashville, Chattanooga & St. Louis Railway Company, its officers and agents, of any and all liability to him of any damages of whatsoever kind and nature that he sustained or suffered, or that he may hereafter sustain or suffer, through, by or on account of said alleged accident and injuries, and acknowledged full satisfaction and discharge of all liability therefor, and thereby released and discharged this defendant, Louisville & Nashville Railroad Company, a joint tort-feasor, from any and all liability for damages on account of said alleged accident and injury, which said release and the warrant in payment of the amount for which said settlement was made, are in the form as shown by Exhibit A hereto, to this answer attached, hereby referred to and made a part hereof.

Wherefore, this defendant says that for the causes aforesaid it is fully discharged from said alleged obligation set out in the complaint herein and from any loss or damage resulting to the plaintiff by reason of anything in his complaint alleged, and said action is barred, and the defendant denies that it is indebted to the plaintiff in any sum whatever on account of the matters in said complaint set forth, and prays to be discharged with its costs, etc.

13. And, further answering in the alternative, this defendant says that for the injuries which plaintiff alleges in his complaint he suffered by reason of an inefficient [fol. 12] brake on a tank car in the terminal railroad yards at Nashville, Tennessee, on the 15th day of February, 1939, a claim was made by him against the Nashville, Chatta-

nooga & St. Louis Railway Company, as his employer, and that his claim for said injuries was paid by said Nashville, Chattanooga & St. Louis Railway Company, and accepted by him in full satisfaction and release of his said claim, and in full payment of his said injuries, as shown by his written release, in full satisfaction, and a draft in payment of such damages in full, a copy of which is Exhibit A to this answer, which is made a part hereof, and reference to which is hereby made. And this defendant avers that the accident and injuries aforesaid, which was settled for in full under the terms of said release, is the same accident and injuries for which plaintiff is claiming damages in this suit; that his right of action is extinguished; that the plaintiff cannot in law have more than one satisfaction for the same injury, and is estopped and barred from prosecuting this action, and that his release and satisfaction in full, as above set forth, for his said claim for damages, is a bar to this suit, and this defendant is entitled to the benefit of said satisfaction in full, and is not liable for such claim.

Wherefore, it prays to be dismissed with its costs, etc.

Farmer, Klingel & Baltz, 25 First National Bank Bldg., Belleville, Illinois, Attorneys for Defendant.

[fol. 13] We hereby acknowledge receipt of two copies of the foregoing amended answer this 9th day of September, 1940.

Eagleton, Waechter & Elam, Jos. B. McGlynn, Attorneys for Plaintiff.

EXHIBIT "A" TO AMENDED ANSWER

Whereas, I, B. F. Belcher of the County of Davidson, State of Tennessee, was injured on the 15th day of February, 1939, at or near Nashville, Tenn. station while engaged as a switchman in Nashville Terminals, riding a car off the south yard hump in Kayne Ave yards, was thrown, or fell, from moving car while tightening the brake.

And, Whereas, I have compromised, adjusted, and settled with the Nashville, Chattanooga & St. Louis Railway all differences arising out of the premises:

Now, therefore, in consideration of One Hundred and Sixty and 00 100 ($160.00) Dollars, to me in hand paid

by said Railway, the receipt of which is hereby acknowledged, I do hereby release, acquit, and discharge the said Nashville, Chattanooga & St. Louis Railway, its officers and agents, of any and all liability to me for any damages, of whatsoever kind and nature, that I have sustained or suffered, or which I may hereafter sustain or suffer, through, by or on account of said accident or injury, and I hereby acknowledge full satisfaction and discharge of all liability therefor.

It is distinctly understood and agreed by me that the sole and only consideration inducing me to the execution [fol. 14] of this release is the payment to me of the sum of money mentioned above.

The effect of this instrument is fully understood by me, and I sign it of my own free will and accord.

Witness my hand in duplicate, this the 3rd day of April 1939.

(Signed) B. F. Belcher.

In presence of (Signed) L. F. Owens, E. B. Duval, Witnesses.

[fol. 15]

The Nashville, Chattanooga & St. Louis Railway

Audit No. 916-Mch. 1939
Law Dept. No. 2 Mo. Apl.
Date of Vo. Apl. 4-1939

In full settlement and satisfaction of all claims by payee against NC&St. L. Ry. for injury received on or about Feby. 15th, 1939, while engaged as a switchman in Nashville Terminals, Kayne Ave. yards, being thrown or falling from a car while setting brake, as per release of this date.

Approved
L. E. McKeand
Comptroller

Audited
A. G. Miller
Auditor of Disbursements

In Settlement of Above Account
Pay
To
The
Order
Of

B. F. Belcher
Nashville, Tenn.

Nashville, Tenn.
Treasurer's No.

One Hundred and Sixty and No 100
Dollars $160.00

To

D. S. Huggins, Treasurer, The N., C. & St. L. Ry.—Nashville, Tennessee

This draft, when endorsed, is in full payment of the account stated herein

B. F. Belcher

[fol. 16] PLAINTIFF'S REPLY TO DEFENDANT'S AMENDED ANSWER—Filed in the City Court of East St. Louis, Illinois, September 23, 1940

Now comes Benjamin F. Belcher, plaintiff in the above-entitled cause, by Mark D. Eagleton and McGlynn & McGlynn, his attorneys, and for reply to the amended answer of defendant in this cause says:

1. For reply to paragraph 5 of defendant's amended answer, plaintiff admits the allegation that defendant was engaged in interstate commerce; denies the allegation that plaintiff was not in the defendant's employ on the occasion of his injury, as in his complaint alleged, and realleges and reaffirms the allegations of his complaint.

2. For reply to paragraph 10 of defendant's amended answer, plaintiff denies the allegations of said paragraph 10, and realleges and reaffirms the allegations of his complaint.

3. For reply to paragraph 11 of defendant's amended answer, plaintiff admits that defendant is a railroad corporation engaged in interstate commerce, and was so engaged on the 15th day of February, 1939; denies all other allegations of said paragraph 11, and realleges and reaffirms the allegations of his complaint.

4. For reply to paragraph 12 of defendant's amended answer, plaintiff denies the allegations of said paragraph 12, and realleges and reaffirms the allegations of his complaint.

4 (a). For further reply to said paragraph 12 of defendant's said amended answer, plaintiff states that he has no [fol. 17] knowledge of the alleged release and voucher referred to in said paragraph of defendant's said answer, and in the form attached to defendant's said answer as Exhibit A thereto; and plaintiff states the facts to be that on said 3rd day of April, 1939, the day said release and voucher alleged by defendant purports to have been executed, and at a time when plaintiff was still physically disabled on account of the injuries sustained by him as alleged in his complaint, plaintiff, at the special instance and request of defendant's claim agent, Ed B. Duval, went to

the office of said Ed B. Duval in Nashville, Tennessee; that the defendant's agents and servants stated and represented to plaintiff that his said injuries were not serious, and that if plaintiff would return to work the pains and disabilities which plaintiff was suffering from said injuries would clear up and disappear from the use of the parts of plaintiff's body in the performance of his regular work; that defendant's said claim agent then and there further stated and represented to plaintiff that defendant desired plaintiff to return to his work to determine whether he was capable of performing his duties, and that, if plaintiff was willing to return to work and attempt to perform his work, defendant was willing to give plaintiff $160.00 as the equivalent of half-time pay for the time which plaintiff had been off work on account of his said injuries, and that, in the event plaintiff found himself unable to perform his work on account of his said injuries, some other and further adjustment could and would be made respecting compensation to plaintiff for the injuries and damages sustained by him as alleged in his complaint herein; that, relying upon said statements and representations of defendant's said agents and servants, and while [fol. 18] exercising ordinary care to ascertain the consequences of his act, plaintiff was then and there induced by defendant's said claim agent to sign a theretofore prepared instrument thereupon produced by said claim agent, and represented by him to plaintiff as being a receipt for $160.00 half-time pay that plaintiff had lost up to that time on account of his said injuries, and upon which said instrument defendant's said claim agent secured for, and delivered to, plaintiff the sum of $160.00. Plaintiff further states that within a few days thereafter, and in accordance with the statements and representations of, and his agreement with, defendant's said claim agent, plaintiff returned to his regular work as a switchman for defendant, and attempted to perform his duties as such; that, because of his said injuries, plaintiff was unable to perform his said duties; that over a period of several weeks subsequent to April 3, 1939, plaintiff repeatedly made efforts to return to his said regular work and to perform the duties thereof, but was unable to do so because of his said injuries, which progressively became worse; that plaintiff's said injuries

finally compelled him to give up all efforts to return to and perform his said work, and that thereafter, although plaintiff requested defendant's said claim agent to make other and further adjustments respecting compensation to plaintiff for his said injuries and damages, defendant's said claim agent failed and declined so to do. Plaintiff further states that, if his signature was obtained to said release and voucher alleged and referred to by defendant, it was obtained without plaintiff ever knowing, assenting to, or agreeing to, the terms thereof, and was obtained by [fol. 19] false, fraudulent and deceitful misrepresentation by defendant's said claim agent (as hereinbefore alleged) that the instrument which plaintiff signed was merely a receipt for $160.00 as the equivalent of half-time pay for the time theretofore lost by plaintiff, by false, fraudulent and deceitful misrepresentation by defendant's agents and servants (as hereinbefore alleged) as to the nature and character of the instrument which plaintiff was induced by defendant's said claim agent to sign as aforesaid by the fraudulent purpose, design and intent on the part of defendant's said claim agent to cheat and defraud plaintiff out of his right of action set out in his complaint herein, and through plaintiff's belief in the aforesaid false and fraudulent misrepresentations by defendant's said agents and servants, as well as plaintiff's belief that said instrument signed by plaintiff, as aforesaid, was a receipt for half time pay for time theretofore lost by plaintiff on account of his said injuries, which could be executed by plaintiff without in any manner affecting his right of action alleged in his complaint herein.

Wherefore, plaintiff prays judgment that said release and voucher alleged by defendant be declared null and void, and that plaintiff have judgment as prayed in his complaint.

5. For reply to paragraph 13 of defendant's amended answer, plaintiff denies the allegations thereof, and here realleges, and by reference thereto here incorporates, the allegations of paragraph 4 (a) of this reply, the same as if said allegations were here set out in detail.

[fol. 20] Wherefore, plaintiff prays judgment that said release and voucher alleged by defendant be declared null

and void, and that plaintiff have judgment as prayed in his complaint.

Mark D. Eagleton, McGlynn & McGlynn, Attorneys for Plaintiff.

Duly sworn to by Benjamin F. Belcher. Jurat omitted in printing.

Notice to sue out dedimus potestatum for taking depositions.

Affidavit for the taking of depositions.

Instructions given and refused at the trial of this cause in the City Court of East St. Louis, Illinois, October 16, 1940.

Form of verdict (not used).

[fol. 21] VERDICT

Verdict in favor of the plaintiff and against the defendant in the sum of $20,000.00, filed in the City Court of East St. Louis, Illinois, October 16, 1940.

Defendant's motion for a new trial, filed in the City Court of East St. Louis, Illinois, October 22, 1940.

Motion of defendant for judgment non obstante veredicto, filed in the City Court of East St. Louis, Illinois, October 22, 1940.

RULING OF THE COURT ON DEFENDANT'S MOTION FOR A NEW TRIAL.—Filed in the City Court of East St. Louis, Illinois, September 18, 1941

On the motion filed by the defendant, the trial court has endeavored to give the motion and the various assigned errors in support thereof full and due consideration, and has carefully read and considered the briefs and reply briefs submitted in this connection, and, I might say, that, in addition thereto, an individual research was made by me as to the law as applied to the motion upon the errors assigned.

From the facts in the case, as aided by the notes taken at the hearing, the Court is of the opinion that the verdict is manifestly contrary to the preponderance or weight of the evidence, and in view of this conclusion it will be un-

necessary for me to pass directly upon the various other errors assigned.

The evidence, in view of the trial court on behalf of the plaintiff, does not warrant the verdict upon the main question involved in the case, namely, whether or not the plaintiff was injured as claimed; neither does the evidence justify the setting aside of the release which was executed by [fol. 22] the plaintiff. It will serve no purpose to narrate the evidence in detail, or comment thereon; suffice to say that in the opinion of the Court the evidence on behalf of the plaintiff falls far short from the rule of requiring the plaintiff to prove his case by the greater weight or preponderance of the evidence.

The motion of the defendant for a new trial in the above-entitled case will be granted. The motion of the defendant for a judgment in favor of the defendant and against the plaintiff notwithstanding the verdict in the case will be denied. The clerk of the court will enter the following order:

> "Motion for a new trial granted and the verdict of the jury is set aside. Motion of defendant for judgment non obstante veredicto denied."

Anticipating that perhaps the plaintiff may desire an appeal from this order, granting a new trial to the Appellate Court, in event such a motion is made, the Court will grant an appeal to the Appellate Court to the plaintiffs upon their filing an appeal bond, to be approved by the clerk of this court, in the sum of $750.00, with the clerk of the court within thirty (30) days from the date of this order, with bill of exceptions to be filed within sixty (60) days.

It is ordered that this memorandum shall be filed in the files of this case, and the clerk enter orders herein directed.

John W. (illegible), Presiding Judge.

[File endorsement omitted.]

[fol. 23] Copy of letter from defendant's counsel addressed to plaintiff's counsel, filed in the City Court of East St. Louis, Illinois, June 16, 1942.

Defendant's motion to dismiss for lack of jurisdiction of the subject matter filed in the City Court of East St. Louis

PLAINTIFF'S MOTION FOR A CHANGE OF VENUE—Filed in the City Court of East St. Louis, Illinois, June 16, 1942

Comes now Benjamin F. Belcher, plaintiff in the above-entitled cause, by Mark D. Eagleton and McGlynn & McGlynn, his attorneys, and states to and shows the Court that:

1. This suit or action was commenced in this court on or about the 22nd day of June, 1940;

2. As appears from the pleadings heretofore filed in this court in this cause, plaintiff's cause of action against defendant, which is involved in this suit or action, is a transitory cause of action which arose in or near the City of Nashville, State of Tennessee;

3. The Supreme Court of Illinois, in the case of Paul W. Werner, Appellee, v. Illinois Central Railroad Company, Appellant, No. 26,293 in said Supreme Court of Illinois, decided March 16, 1942, rehearing denied June 9, 1942, and not yet reported, has ruled that each of the various City Courts in the State of Illinois is without jurisdiction to hear and determine any suit or action involving a cause of action which arose outside the city where said court is located; and

[fol. 24] 4. By reason of the premises, this suit or action has been commenced, and is pending, in the wrong court, and the venue thereof should be changed to a proper court, pursuant to the terms and provisions of Chap. 146, Par. 36, Illinois Revised Statutes 1941.

Plaintiff further states that he is ready, willing and able, and hereby offers, to pay any and all costs required of him by the terms and provisions of said Chap. 146, Par. 36, Illinois Revised Statutes 1941.

Wherefore, plaintiff moves this Court, pursuant to the terms and provisions of said Chap. 146, Par. 36, Illinois Revised Statutes 1941, to change the venue of this suit or action to a proper court, to wit, the Circuit Court of St. Clair County, State of Illinois.

Mark D. Eagleton, McGlynn & McGlynn, Attorneys for Plaintiff Benjamin F. Belcher.

Receipt of a copy of the above and foregoing motion is hereby acknowledged this 16 day of June, 1942.

Filing endorsement (on reverse side of page).

Notice of hearing on plaintiff's motion for change of venue, filed in the City Court of East St. Louis, Illinois, June 16, 1942.

[fol. 25] **Orders of the City Court of East St. Louis, Illinois**

Now on this 9th day of July, 1940, motion to dismiss or strike on account of insufficient complaint is filed herein.

ORDER DENYING MOTION TO STRIKE COMPLAINT

And now on this 19th day of July, 1940, the same being a judicial day of this court, come the parties to this suit, by their respective counsel, for a hearing on the motion heretofore filed herein to strike the complaint; said motion is presented to Presiding Judge W. W. Damron, sitting at the request of Judge William F. Borders, and after arguments of counsel and due deliberation by the Court, said motion is denied; and it is ordered by the Court that the defendant be and it is hereby required to answer on or before August 12, 1940.

And now on this 9th day of September, 1940, leave is given defendant to file an amended answer herein, and same filed.

ORDER DENYING MOTION FOR DIRECTED VERDICT

And now on this 14th day of October, 1940, the same being a judicial day of this court, come again the parties to this suit, by their respective counsel, and case is called for trial by Presiding Judge J. W. Preibs, sitting at the request of Judge William F. Borders; and issues being joined, it is ordered that a jury come, whereupon comes the jury, twelve good and lawful persons, duly selected, tried and sworn according to law, well and truly to try the issues joined herein and a true verdict render; opening statements are made, witnesses sworn and testimony presented; and at the close of all of the evidence offered on behalf of the plaintiff, defendant presents a motion for a directed verdict in favor of [fol. 26] defendant, and said motion is denied and instruction refused. And the hour for adjournment having arrived, it is ordered by the Court, that this Court take a re-

And now on this 15th day of October, 1940, the same being a judicial day of this court, come again the parties to this suit, by their respective counsel, and the jurors heretofore impaneled herein for the trial of this cause also come, and court proceeds; and testimony is presented on behalf of the defendant and evidence concluded; and the hour for adjournment having arrived, it is ordered by the Court, that this Court take a recess until tomorrow morning at 10 o'clock, and the jurors be permitted to separate until that time.

ORDER DENYING MOTION FOR DIRECTED VERDICT

And now on this 16th day of October, 1940, the same being a judicial day of this court, come again the parties to this suit, by their respective counsel, and the jurors heretofore impaneled herein for the trial of this cause also come, and court proceeds; and at the close of all of the evidence introduced in this cause, defendant offers a motion for an instructed verdict in favor of the defendant, and said motion is denied and instruction refused; and the jurors, after hearing all of the evidence adduced, arguments of counsel and instructions of the Court, retire in charge of two sworn officers to consider of their verdict, and on the same day the jury reports and returns into open court the following verdict:

VERDICT

"We, the jury, find the defendant guilty and we assess the plaintiff's damages at Twenty Thousand Dollars ($20,000.00)."

[fol. 27] And now on this 8th day of November, 1940, the same being a judicial day of this court, come again the parties to this suit, by their respective counsel, for a hearing on the motion for judgment notwithstanding the verdict and motion for a new trial heretofore filed herein; and it is ordered by the Court that defendant submit brief and argument in writing by November 15, 1940, and plaintiff within ten days thereafter.

ORDER GRANTING MOTION FOR NEW TRIAL, ETC.

And now on this 18th day of September, 1941, the same being a judicial day of this court, after due deliberation by

of the jury is set aside; and motion of defendant for judgment non obstante veredicto is denied.

In event of appeal, it is ordered by the Court that the appeal bond be, and the same is hereby fixed at the penal sum of seven hundred fifty dollars ($750.00).

And now on this 19th day of January, 1942, defendant's motion to dismiss for lack of jurisdiction of the subject matter is filed herein.

And now on this 16th day of June, 1942, plaintiff's motion for a change of venue and notice are filed herein.

And now on this 19th day of June, 1942, the same being a judicial day of this court, come again the parties to this suit, by their respective counsel, and motion for transfer of suit because cause of action is pending in the wrong court is presented to the Court and argued by respective counsel, James A. Farmer for defendant, and Roberts P. Elam for plaintiff; and it is ordered by the Court that time be and is hereby given to furnish briefs herein.

[fol. 28] And now on this 17th day of July, 1942, the same being a judicial day of this court, upon the arguments heretofore heard and the briefs submitted herein, motion to have this suit transferred to the Circuit Court of St. Clair County, Illinois, is allowed, after due deliberation by the Court, and it is ordered by the Court that the clerk of this court transmit the files in this suit, together with a copy of the court orders, to the Circuit Court of St. Clair County, Illinois, for further proceedings, as per written order signed by the Judge.

Order Granting Change of Venue — Filed in the City Court of East St. Louis, Illinois, July 17, 1942

Motion of plaintiff for change of venue from this court to the Circuit Court of St. Clair County, Illinois, pursuant to the provisions of Chapter 146, Paragraph 36, Illinois Revised Statutes 1941, heretofore filed, is presented and argued

The Court having considered the matter and being fully advised in the premises, grants said motion and change of venue of said cause from the City Court of East St. Louis, Illinois, to the Circuit Court of St. Clair County, Illinois; and plaintiff is hereby assessed with all costs in this suit no

except such costs as shall have been occasioned by the defendant's answer to the complaint and the trial heretofore had herein, which said costs shall abide final judgment herein. The clerk of this court is hereby instructed and directed to transmit all and singular a transcript of the [fol. 29] record and proceedings in this case in this court, together with all orders, papers, pleadings and files to the Clerk of the Circuit Court of St. Clair County, Illinois, without delay, for further proceedings in the Circuit Court of St. Clair County, Illinois.

William F. Borders, Judge of the City Court of East St. Louis, Illinois.

Certificate of the Clerk of the City Court of East St. Louis, Illinois, to the transcript and file, filed in the Circuit Court of St. Clair County, Illinois, on August 10, 1942, which said certificate is dated August 10, 1942.

DEFENDANT'S MOTION TO QUASH THE PROCESS OF SUMMONS ISSUED OUT OF THE CITY COURT OF THE CITY OF EAST ST. LOUIS, AND TO DISMISS CAUSE—Filed in the Circuit Court of St. Clair County, Illinois, August 15, 1942

And now comes the defendant, Louisville & Nashville Railroad Company, by Farmer, Klingel & Baltz, its attorneys, and enters its limited and special appearance herein for the sole purpose of this motion to quash the summons heretofore issued by order of the City Court of the City of East St. Louis in this cause, and to dismiss this suit.

The transcript herein shows that the plaintiff's alleged cause of action accrued on February 15, 1939, in the State of Tennessee, and beyond and outside of the city limits of the City of East St. Louis, Illinois, and that this suit is [fol. 30] predicated on the Federal Employers' Liability Act only.

1. This defendant, therefore, moves the Court to quash the process of summons heretofore issued by order of the City Court of East St. Louis, Illinois, in this cause, of date the 22nd day of June, 1940, for the reason that the City Court of the City of East St. Louis had no jurisdiction under

2. The process of summons issued out of said City Court of East St. Louis, Illinois, and served on the defendant in this cause, is void and ineffective for the reason that said Court had no jurisdiction of said suit.

3. This suit having originated in the State of Tennessee, and not within the city limits of East St. Louis, the process of summons issued herein by the City Court of East St. Louis should be quashed, because the same is void and of no validity and of no effect.

4. And this defendant moves to dismiss said suit for the reasons above stated, and because this suit is predicated on the Federal Employers' Liability Act, and the limitation within which said suit shall be instituted under said act has long expired and this suit is now barred.

5. That there has been no service on this defendant of process of summons herein out of this court.

6. This suit is predicated on the Federal Employers' Liability Act, and the limitation within which suit shall be instituted under said act has long expired, and this suit is now barred.

[fol. 31] 7. Section 36 of Chapter 146 of the Venue Act of the Revised Statutes of Illinois has no application to suits involving the Federal Employers' Liability Act, where the cause of action arose beyond and outside the city limits of the City of East St. Louis.

8. The plaintiff's alleged cause of action involved in this controversy arose in the State of Tennessee, and out of and entirely beyond the city limits of the City of East St. Louis, and over which the City Court of the City of East St. Louis has no jurisdiction.

9. That the City Court of East St. Louis, being without jurisdiction of the subject matter of this cause, under the provisions of Section 1 of Article VI of the Constitution of 1870 of the State of Illinois, has no authority, power or jurisdiction to transfer this cause to another court.

10. This alleged cause of action accrued on February 15, 1938, in the State of Tennessee, as shown by the trans-

under the provisions of Section 6 of the Federal Employers' Liability Act, and cannot be instituted nor maintained in any court.

11. A cause of action accruing on February 15, 1939, is limited to two years within which suit may be brought, predicated on the Federal Employers' Liability Act, and the time within which suit may be brought cannot be extended by any state law or court order.

12. The City Court of the City of East St. Louis, being without jurisdiction of this cause, had not the power and [fol. 32] authority to transfer or change the venue of the same to the Circuit Court of St. Clair County, Illinois; and said Circuit Court is not authorized by law to receive by transfer or change of venue a cause from the City Court of East St. Louis which that Court has no jurisdiction to hear and determine.

Wherefore, this defendant moves to quash said summons heretofore issued by the City Court of East St. Louis and to dismiss this suit for the reasons hereinabove set forth.

Farmer, Klingel & Baltz, Attorneys for Defendant, Louisville & Nashville Railroad Company.

Orders of the Circuit Court of St. Clair County, Illinois.

Order Sustaining Defendant's Motion to Dismiss, and Entering Judgment of Dismissal—Entered in the Circuit Court of St. Clair County, Illinois, November 27, 1942

Now on this 27th day of November, A. D. 1942, briefs of all parties duly furnished and motions heretofore duly heard and cause is taken on oral arguments and briefs of the respective parties. Defendant's motion is duly considered by the Court and the Court allows said motion. It is therefore ordered by the Court that this suit be and the same is hereby dismissed at the cost of the plaintiff. It is further ordered and adjudged that the plaintiff take nothing by this suit and that the defendant go hence without day. Plaintiff excepts. Execution ordered to issue.

[fol. 33] Certificate of Trial Judge—Filed in the Circuit Court of St. Clair County, Illinois, February 23, 1943

I, Alfred D. Riess, Judge of the Circuit Court of St. Clair County, State of Illinois, before whom and by whom the above-entitled cause was heard and final order and judgment of dismissal therein entered, do hereby certify that there is involved in said case, and in said final order and judgment, a construction of the Constitution, and the validity of a statute, to wit, Section 36 of Chapter 146, Revised Statutes of Illinois 1941, and certain other Illinois statutory provisions to be therewith construed.

I further certify that, in my opinion, the public interest requires that the appeal herein shall be taken directly to the Supreme Court of Illinois.

Dated this 13 day of February, 1943.

Alfred D. Riess, Judge of the Circuit Court of St. Clair County, Illinois.

Notice of Appeal

Plaintiff-appellant's notice of appeal to the Supreme Court of Illinois from the Circuit Court of St. Clair County, Illinois, filed February 23, 1943, appealing from the whole of the order and final judgment entered in this cause on the 27th day of November, 1942; sustaining defendant-appellee's motion to dismiss and dismissing plaintiff-appellant's action and cause at his cost, and asking by way of relief that said order and judgment be reversed and the cause remanded to said Circuit Court of St. Clair County, Illinois, with directions to reinstate plaintiff-appellant's [fol. 34] cause upon the docket of said Circuit Court for further proceedings therein, to set aside and vacate said order, ruling and judgment sustaining defendant-appellee's motion to dismiss and dismissing plaintiff-appellant's cause, and to overrule defendant-appellee's motion to dismiss, with the certificate of the Clerk of said Circuit Court as to the filing of said notice of appeal, together with proof of service of a copy of said notice of appeal upon opposing counsel on February 23, 1943.

Praecipe for record, with proof of service of copy thereof

Certificate of the Clerk of the Circuit Court of St. Clair County, Illinois, to the transcript of record, dated March 22, 1943.

The above and foregoing is respectfully submitted as and for plaintiff-appellant's abstract of record herein.

McGlynn & McGlynn, 120 North Main Street, East St. Louis, Illinois; Mark D. Eagleton, 3746 Grandel Square, St. Louis, Missouri; Roberts P. Elam, 706 Chestnut Street, St. Louis, Missouri, Attorneys for Plaintiff-Appellant.

[fol. 3] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the tenth day of May in the year of our Lord, one thousand nine hundred and forty-three, within and for the State of Illinois.

Present: Clyde E. Stone, Chief Justice, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice William J. Fulton, Justice Walter T. Gunn, Justice June C. Smith, Justice Charles H. Thompson, George F. Barrett, Attorney General, Warren C. Murray, Marshal, Attest: Edward F. Cullinane, Clerk pro tempore.

Be it remembered, that, to-wit: on the 20th day of May, A. D. 1943, the same being one of the days of the term of Court aforesaid, an order of submission was entered by the Supreme Court of Illinois in the same case, which order of submission is in the words and figures following, to-wit:

[fol. 4] No. 27276

BENJAMIN F. BELCHER, Appellant

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a corporation, Appellee

Appeal, Circuit Court, St. Clair County.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that appellant hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee

Having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court

said cause is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 5] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the thirteenth day of September in the year of our Lord, one thousand nine hundred and forty-three, within and for the State of Illinois.

Present: June C. Smith, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice William J. Fulton, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Warren C. Murray, Marshal.

Attest: Edward F. Cullinane, Clerk pro tempore.

Be it remembered, that, to-wit: on the 24th day of September, A. D. 1943, the same being one of the days of the term of Court aforesaid, an opinion was filed by the Supreme Court of Illinois in the office of the clerk of the Supreme Court of Illinois, in the same case, which opinion is in the words and figures following, to-wit:

[fol. 6] Docket No. 27276—Agenda 41—May, 1943

BENJAMIN F. BELCHER, Appellant,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellee

Mr. Justice WILSON delivered the opinion of the court:

June 22, 1940, the plaintiff, Benjamin F. Belcher, brought an action in the city court of East St. Louis against the defendant, the Louisville & Nashville Railroad Company, seeking to recover damages under the Federal Employers' Liability Act for injuries sustained on February 15, 1939,

favor of plaintiff. Defendant's motion for a new trial was granted, the verdict set aside and a new trial ordered. January 19, 1942, defendant interposed its motion to dismiss the cause for the reason that the city court lacked jurisdiction of the subject matter. Thereafter, on March 16, 1942, this court held that a city court has no jurisdiction of a cause of action under the Federal Employers' Liability Act where the accidental injuries occurred, as here, without the territorial limits of the city. (*Werner* v. *Illinois Central Railroad Co.* 379 Ill. 559; *Mitchell* v. *Louisville & Nashville Railroad Co.* 379 Ill. 522). Subsequently, plaintiff filed a motion in the city court of East St. Louis for a change of venue to the circuit court of St. Clair county on the ground that his action had been commenced, and was pending, in the wrong court and that, consequently, the venue should be changed to a proper court, pursuant to the statute pertaining to change of venue in such cases. (Ill. Rev. Stat. 1941, chap. 146, par. 36.) July 17, 1942, this motion was sustained and, on August 10, 1942, a certified transcript of the entire record in the city court of East St. Louis was filed in the circuit court of St. Clair county. Defendant, appearing specially, made a motion to quash the summons issued by the city court and to dismiss the cause for the reason, among others, that the cause having been ordered transferred to the circuit court on July 17, 1942, more than two years after the date plaintiff suffered his injuries, namely, February 15, 1939, he could neither institute nor maintain his action in the circuit court since it had not been commenced within the two years from the day the cause of action accrued, conformably to section 6 of the Federal Employers' Liability [fol. 7] Act. (Section 56, Title 45, U. S. C. A. 1941.) November 27, 1942, the motion was sustained and judgment rendered in favor of defendant. Plaintiff prosecutes a direct appeal to this court, the trial judge having certified that a construction of the constitution and the validity of the above statute concerning venue are involved.

Upon parallel facts, *Herb* v. *Pitcairn*, No. 27275, decided this day, holds that an action is not commenced within two years of the date of injury in a court of competent jurisdiction, as prescribed by section 6 of the Federal Employers' Liability Act, by transferring the cause from a city court lacking jurisdiction of the subject matter at a date when

court, could not be maintained because not commenced within the statutory time. Our disposition of the identical issue in *Herb* v. *Pitcairn* is decisive here.

The judgment of the circuit court is affirmed.

Judgment affirmed

[fol. 8] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Supreme Court, begun and held in Springfield, on Monday, the 13th day of September in the year of our Lord, one thousand nine hundred and forty three, within and for the State of Illinois.

Present: June C. Smith, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice William J. Fulton, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Warren C. Murray, Marshal.

Attest: Edward F. Cullinane, Clerk por tempore.

Be It Remembered, that, to-wit: on the 24th day of September, A. D. 1943 the same being one of the days of the said term of said Supreme Court, certain proceedings were had in said court and entered of record in the words and figures following, to-wit:

No. 27276

BENJAMIN F. BELCHER, Appellant,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a Corporation, Appellee

Appeal from Circuit Court, St. Clair County. 7225

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here that neither in

of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the circuit court of St. Clair county aforesaid, Be Affirmed in All Things and Stand in Full Force and Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellant Costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Edward F. Cullinane, Clerk pro tempore of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 24th day of September A. D. 1943.

Edward F. Cullinane, Clerk pro tempore, Supreme Court of the State of Illinois. (Seal.)

[fol. 9] And afterwards, to-wit: on the 19th day of October, A. D. 1943, the same being one of the days in vacation after the term of Court aforesaid, there was filed by appellant in the office of the Clerk of the Supreme Court of Illinois in the same case, a petition for rehearing, which petition is in the words and figures following, to-wit:

[fols. 40-41] In the Supreme Court of Illinois

Appellant's Petition for Rehearing—Filed October 19, 1943

Comes now Benjamin F. Belcher, by McGlynn & McGlynn, Mark D. Eagleton and Roberts P. Elam, his attorneys, and presents his petition for a rehearing of the above-entitled cause, and respectfully prays that a rehearing be granted in said cause on the grounds and for the reasons in the petition herewith presented.

McGlynn & McGlynn, Mark D. Eagleton, Roberts P. Elam, Attorneys for Appellant Benjamin F. Belcher.

[fol. 42] May It Please the Court:

I

This Honorable Court, in rendering its opinion and decision in this case, has overlooked, misconceived or misapprehended the point that, notwithstanding that the City Court of East St. Louis was without jurisdiction to hear and determine the merits of plaintiff-appellant's action against defendant-appellee, plaintiff's said action was "commenced" in that City Court within the two-year period prescribed by Section 6 of the Federal Employers' Liability Act (45 U. S. C. A. [1934 Edition], § 56), and that the City Court had a limited jurisdiction over that action, by virtue of the Illinois Revised Statutes 1941, Chapter 146, par. 36, which authorized and empowered the City Court to change the venue of such action to the Circuit Court of St. Clair County, which had jurisdiction to hear and determine the merits of plaintiff's case.

Since the opinion in this case is predicated solely upon, and by reference incorporates, the opinion in Herb v. Pitcairn, No. 27275, decided concurrently with the instant case, we are compelled to advert to the opinion in the Herb case for the reasons upon which the decision in the instant case was based.

On page 1 of the printed opinion in the Herb v. Pitcairn case, this Honorable Court fully recognized that the plaintiff's action was "commenced within two years from the [illegible] required by Section 6

of the Federal Employers' Liability Act, for this Court there said:

> "The facts in the case are substantially as follows: The plaintiff was an employee of the receivers of the Wabash Railway Company, and December 22, 1937, [fol. 43] **commenced an action** in the City Court of Granite City, Illinois, against the defendants, stating a cause of action under the Federal Employers' Liability Act for injuries claimed to have been sustained in the City of Decatur, Illinois, November 23, 1936." (Emphasis ours.)

However, this Court overlooked, misconceived or misapprehended the requirements of that section of the Federal Act, for on pages 2 and 3 of the printed opinion of that case it said:

> "The material point for consideration is whether the plaintiff has commenced an action within two years of the date of his injury **in a court having jurisdiction to hear and determine the same, as required by Section 6 of the Federal Employers' Liability Act**, by transferring the cause from a court having no jurisdiction over it at a date which, if then originally filed in the latter court, could not be maintained because not filed within the statutory time." (Emphasis ours.)

And, again, on page 4 of the printed opinion, it further said:

> "Applying now these principles to the facts before us we observe recovery under the Federal Employers' Liability Act is conditioned upon two things: (1) Commencing an action within two years from the date of the injury; and (2) **commencing such action in a court having jurisdiction to hear and determine the same.** * * * The plaintiff having predicated his case upon the Federal Employers' Liability Act must comply with its provisions, both with respect to the time of commencing the suit **and of bringing it in a court having jurisdiction to hear and determine it.**" (Emphasis ours.)

[fol. 44] We respectfully submit that Section 6 of the Federal Employers' Liability Act does not necessarily require

that actions thereunder must be "commenced" in a court having jurisdiction to hear and determine the merits of the action. We recognize that a suit is not "commenced" until a proceeding is instituted in a court which has acquired jurisdiction of something in relation to the controversy. We submit that, in the instant case, the City Court of East St. Louis had acquired jurisdiction over the person of plaintiff when he applied for its power and assistance in connection with his rights under the law, and that it then had—by virtue of Illinois Revised Statutes 1941, Chap. 146, par. 36—a limited jurisdiction to transfer plaintiff's action, by change of venue, to a "proper court" having jurisdiction to hear and determine the merits of that action. This transfer by change of venue, as pointed out at pages 24 and 25 of appellant's original brief herein and again at pages 6 and 7 of appellant's reply brief herein, did not constitute the dismissal of plaintiff's suit in the City Court and the commencement of a new suit in the Circuit Court, but constituted merely one of the steps or proceedings in the prosecution of the suit commenced in the City Court and ultimately to be determined on its merits in and by the Circuit Court. It thus appears that when plaintiff commenced his action in the City Court of East St. Louis, within two years from the date his cause of action accrued, he fully complied with the requirements of Section 6 of the Federal Employers' Liability Act, which, in so far as is here material, provided:

> "No action shall be maintained under this chapter unless commenced within two years from the day the [fol. 45] cause of action accrued. * * * The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. * * *."

II

This Honorable Court, in rendering its opinion and decision in this case, has overlooked, misconceived or misapprehended the opinion and decision of this Court in Central Illinois Public Service Co. v. Industrial Commission, 293 Ill. 62, 127 N. E. 80, and the effect of that decision upon the case at bar.

(A)

On page 6 of the printed opinion in the Herb v. Pitcairn case, with reference to the decision in the Central Illinois Public Service Co. case, this Court said:

> "In that case we held the venue statute in Illinois, as applying to a circuit court having no jurisdiction over the subject matter, has no other purpose than to authorize a transfer to another circuit court which had, but does not affect any of the other rights of the parties."

And on page 7 of the printed opinion this Court in that connection further said:

> "The distinction to be drawn is that if a case is improperly filed in a court having jurisdiction of the cause generally, but without its territorial jurisdiction, it may be transferred to the proper circuit court. But, **if the cause is filed in a court which could never lawfully acquire jurisdiction**, the transfer to a court which would have had jurisdiction gives no validity to the proceedings in the first court." (Emphasis ours.)

[fol. 46] In making this last statement we respectfully submit, this Honorable Court has overlooked that under the facts in the Central Illinois Public Service Co. case, supra, the Circuit Court of Coles County "could never lawfully acquire jurisdiction" to hear and determine the merits of, or over the person of the administrator party in, the suit there commenced in that court. This Court, nevertheless, there ruled that the Circuit Court of Coles County, by virtue of what is now Illinois Revised Statutes 1941, chap. 146, par. 36, was vested with a limited jurisdiction which empowered that Court to change the venue of that suit to the Circuit Court of Champaign County, which was a "proper court" having jurisdiction of the subject matter of the suit and the means of acquiring jurisdiction over the person of the administrator involved therein. This Court, with reference to the effect of the act which is now Illinois Revised Statutes 1941, chap. 146, par. 36, there specifically ruled that (293 Ill. l. c. 69):

> "By this act it is evident that **the legislature intended to and did confer on all courts of record in**

this State, without regard to any other jurisdiction either conferred upon or denied it by common law or statute, jurisdiction to 'change the venue of such suit or proceeding to the proper court or county.' It cannot be doubted that the power to confer that **limited jurisdiction** lies within the powers of the legislature, and * * * while the circuit court of Coles County had no jurisdiction of the subject matter involved for any other purpose than that defined in the Venue Act of 1891 [now Illinois Revised Statutes 1941, ch. 146, par. 36], and could therefore enter no order affecting the rights of the parties * * * that court was by said act empowered to transfer the cause to the proper [fol. 47] county * * *, and under said act when said transfer was made the cause was from that time forward pending in the circuit court of Champaign County." (Emphasis and bracketed portion supplied.)

The ruling in the Central Illinois Public Service Co. case, supra, to the effect that the Venue Act conferred on all courts of record in Illinois, without regard to any other jurisdiction either conferred upon or denied them, a "limited jurisdiction" to change the venue of any suit or proceeding improvidently brought in any such court to the proper court or county, was not in the slightest degree weakened, criticized or modified by the ruling in the case of Gill v. Lynch, 367 Ill. 203, 10 N. E. (2d) 812. On the contrary, the decision in Gill v. Lynch, supra, reaffirms the doctrine of the Central Illinois Public Service Co. case, for it holds that the transfer of the cause in the Gill case from the County Court to the Circuit Court upon change of venue under the Venue Act, was valid, and ruled void only the orders appointing receivers, saying (10 N. E. [2d] 814):

> "These holdings conclusively demonstrate that the county court had no jurisdiction to hear a petition for appointment of a receiver or for any other purpose **except to transfer the cause to the proper court.** The appointments, and all subsequent orders, **except that transferring the cause,** being void, the cause therefore went to the circuit court **with the petitions for appoint-**

ment of a receiver still pending and undetermined." (Emphasis ours.)

[fol. 48] (B)

Furthermore, it should be noted that in the Central Illinois Public Service Co. case, supra, there was involved the question of whether, as the statute required, the suit there had been by writ of certiorari "commenced within twenty days of the receipt of notice of the decision of the board." The opinion discloses that the decision of the Board had been rendered on August 10, 1918; that the praecipe for writ of certiorari had been filed on August 26, 1918, in the Circuit Court of Coles County, which Court, the opinion rules, was without jurisdiction of the subject matter of the suit or of the administrator party; that the change of venue under the Venue Act was not applied for until May 3, 1919, many months after the decision of the Board, and that thereafter the change of venue was granted and the transcript on change of venue filed in the Circuit Court of Champaign County. This Court there held that the suit was "commenced" within twenty days after the decision of the Board, *and when the proceeding was instituted by the filing of the praecipe for writ of certiorari in the Circuit Court of Coles County (which had no jurisdiction to hear and determine the merits of the suit)*, notwithstanding that the change of venue to the Circuit Court of Champaign County (which had jurisdiction to hear and determine the merits of the suit) did not take place until some months thereafter. It necessarily follows from that decision that it should be ruled in the case at bar that plaintiff's suit was "commenced within two years from the day the cause of action accrued," and when the proceedings were instituted in the City Court of East St. Louis, rather than when [fol. 49] the change of venue to the Circuit Court of St. Clair County took place under the provisions of the Venue Act.

III

This Honorable Court, in rendering its opinion and decision in this case, has overlooked, misconceived or misapprehended the effect of sustaining the plaintiff's position in this case.

On page 5 of the printed opinion in the Herb v. Pitcairn case the Court said:

> "When the present suit was filed in the city court of Granite City the defendants could have disregarded the summons, and judgment rendered in such court would have been without effect and no justification for seizing defendants' property on execution. Yet, if appellant's contention is sustained, a valid judgment could be obtained by transferring the cause to the proper court upon a summons or notice that defendants could safely disregard when served upon them. This would give the order of transfer by the city court the effect of vitalizing process that was void and **considering a case commenced and pending in a proper court during a period when, in legal contemplation, no judicial control of defendants had yet been exercised.**" (Emphasis ours.)

This quotation indicates that this Honorable Court conceives it to be necessary to the "commencement" and "pendency" of a suit that the Court in which the proceeding was instituted should have jurisdiction over the person of the defendant. Ordinarily, and in the absence of statutory restrictions, whether a suit is "commenced" or "pending" does not depend upon service of process upon the de- [fol. 50] fendant, or the existence of jurisdiction over him (see 1 Corpus Juris Secundum, pp. 1396-1397, § 129), and in Illinois the only requirement for the commencement of an action or suit is the filing of the complaint (see Illinois Revised Statutes 1941, chap. 110, par. 129). So, even if the summons issued out of the City Court in the case at bar could have been disregarded by defendant, and even if it should be necessary that a new summons or notice be issued out of the Circuit Court to which the venue had been changed, and served upon defendant, in order for plaintiff to secure the rendition of a valid judgment against defendant, the fact that such summons had not been issued and served would not alter the fact that plaintiff's suit had been "commenced" in the City Court, and thereafter remained "pending." That is to say, plaintiff's suit had been "commenced" within the time required by the Federal Act, and thereafter remained "pending," even though

the City Court, and the Circuit Court to which the venue of the suit was changed under the Venue Act, had not acquired jurisdiction over the person of the defendant.

In view of the fact that this Court has overlooked, misconceived or misapprehended the matters above pointed out, we urge that a rehearing should be granted, and that on such rehearing the judgment of the Circuit Court should be reversed, and this cause remanded for further proceedings.

Respectfully submitted, McGlynn & McGlynn, Mark D. Eagleton, Roberts P. Elam, Attorneys for Appellant.

[fol. 11] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of November in the year of our Lord, one thousand nine hundred and forty-three, within and for the State of Illinois.

Present: June C. Smith, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice William J. Fulton, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Warren C. Murray, Marshal.

Attest: Edward F. Cullinane, Clerk pro tempore.

Be it remembered, that, to-wit: on the 12th day of November, A. D. 1943, the same being one of the days of the term of Court aforesaid, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

No. 27276

BENJAMIN F. BELCHER, Appellant,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Corporation, Appellee

Appeal, Circuit Court, St. Clair County

ORDER

And now on this day, the Court having duly considered the petition for rehearing filed by appellant in the above entitled cause, and the Court being fully advised in the premises,

It Is Ordered that the petition for rehearing be, and the petition for rehearing is hereby denied.

[fol. 12] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of November in the year of our Lord, one thousand nine hundred and forty-three, within and for the State of Illinois.

Present: June C. Smith, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice William J. Fulton, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Warren C. Murray, Marshal.

Attest: Edward F. Cullinane, Clerk pro tempore.

Be it remembered, that, to-wit: on the 19th day of November, A. D. 1943, the same being one of the days of the term of Court aforesaid, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

No. 27276

BENJAMIN F. BELCHER, Appellant,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a Corporation, Appellee

Appeal, Circuit Court, St. Clair County

ORDER

Now on this day the Court having duly considered the motion by appellant to stay the mandate for a period of ninety days, and the Court being fully advised in the premises,

It Is Ordered that the mandate in the above entitled case be, and the mandate is hereby stayed for a period of ninety days.

[fol. 13] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

I, Edward F. Cullinane, Clerk pro tempore of the Supreme Court of the State of Illinois, and keeper of the records and seal thereof, do hereby certify the foregoing to be a true copy of

1. abstract of record filed April 20, 1943
2. order of submission entered May 20, 1943
3. opinion filed September 24, 1943
4. mandate
5. petition for rehearing filed October 19, 1943
6. order denying petition for rehearing entered November 12, 1943
7. order staying mandate for a period of ninety days entered November 19, 1943.

in a certain cause entitled in this Court

No. 27276

BELCHER, Appellant,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a Corporation, Appellee

Appeal, Circuit Court, St. Clair County

Witness: my hand and seal of said Supreme Court, in Springfield, in said State, this first day of December A. D. 1943.

Edward F. Cullinane, Clerk pro tempore. (Seal.)

[fol. 54] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 27, 1944

The petition herein for a writ of certiorari to the Supreme Court of the State of Illinois is granted, and the case is consolidated with No. 681 for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.